LIBRARY
SUPREME COURT U S

Office - Supreme Court, U. S.
FILED
OCT 19 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATOR OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,
Petitioner

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A DOMESTIC CORPORATION,
Respondent

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fourth Circuit

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY IN OPPOSITION

WALTER LEAKE,
MEADE T. SPICER, JR.,
1103 Mutual Building,
Richmond, Virginia.

STROTHER HYNES,
1500 First National Bank Bldg.,
Richmond, Virginia.
Counsel for Respondent.

Index

		Page
I	Opinions Of The Courts Below	1
II	Rules As To Writs of Certiorari Applicable	2
III	Sole Question Presented By The Petition	2
IV	Summary Statement Of Matter Involved Insufficient	6
	(1) The Singleness And Simplicity of the Matter Involved Obscured By The Summary Statement In The Petition	7
	(2) The Summary Statement Is Erroneous And Misleading As To The Nature And Character Of The Trial Proceedings	10
V	Statement Of The Case	12
VI	Some Assertions And Inferences Of Fact In Petitioner's Brief Which Are Contrary To And Unsupported By The Testimony	16
VII	Argument	19
	No Self-Contradiction Created By Answers of Witness Wilds To "Standing-Up-Straight" Questions	19
	The Fact That The Witness Is Adverse To The Plaintiff Does Not Relieve The Plaintiff Of The Burden Of Proof	23
	No Unfavorable Presumption From Alleged Failure Of Defendant To Introduce Conductor Holland As A Witness	25
	View	27
VIII	Authorities	29
IX	Conclusion	33

Table of Cases

	Page
Arnold v. Wood, 173 Va. 18, 24, 3 S.E. (2d) 374	26
Beamer v. Virginian Ry. Co., 181 Va. 650, 26 S.E. (2d) 43	31
Butler v. Parrocha, 186 Va. 426, 43 S.E. (2d) 1	22, 25
Bunt v. Sierra Butte Gold Mining Co., 138 U. S. 483	24
C&O Ry. Co. v. Nickel, 157 Va. 382, 161 S.E. 248	28
Cruzan v. N. Y. C. & H. R. R. Co., 227 Mass. 594, 116 N.E. 879	24
De Pascale v. Penn. R. Co., 180 F. (2d) 825, 827	27
Eckenrode v. Penn. R. Co., 164 F. (2d) 996	23
Eckenrode v. Penn. R. Co., 335 U. S. 329	23
Fore v. Sou. Ry. Co., 178 F. (2d) 349	31
Gray v. Sou. Pacific Co., 145 P. (2d) 561	29
Kurimsky v. Unity Rys. Co., 55 A. (2d) 378	29
Lavender v. Kurn, 327 U. S. 645	4, 11, 29, 30
Puckett v. Draper, 156 Va. 238, 158 S.E. 68	26
Southern Power Co. v. North Carolina Pub. Ser. Co., 263 U. S. 508	5
Stanford v. Penn. R. Co., 171 F. (2d) 632	29
Tennant v. Peoria, etc. R. Co., 321 U. S. 29	11, 18, 29, 30
Tiller v. A. C. L. R. Co., 318 U. S. 54	11, 18, 31
Wilkerson v. McCarthy, 336 U. S. 53	31
Young v. United States, 97 F. (2d) 200, 117 A.L.R. 316	22

Textbooks

	Page
53 Am. Juris, p. 354	29
53 Am. Juris, p. 531	27
64 Corpus Juris, Sec. 90, p. 89	28
1 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 21, p. 51	27
1 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 22, p. 53	27
2 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 408, p. 768	28
2 Wigmore on Evidence (3d ed.) Sec. 290, pp. 179-180	27

Statute

	Page
United States Code Annotated, Title 28, Sec. 1254(1)	2

In the

Supreme Court of the United States

October Term, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATOR OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,
Petitioner

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A DOMESTIC CORPORATION,
Respondent

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Fourth Circuit

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY IN OPPOSITION

I

OPINIONS OF THE COURTS BELOW

(1) The opinion of the United States Court of Appeals for the Fourth Circuit is contained in Appellee's Appendix, pages 33-38, not yet officially reported, but when so reported will appear in 183 F. 2nd.

(2) The memorandum opinion of the District Court of the United States for the Eastern District of Virginia appears on pages 4 and 5 of the Appendix to Appellant's brief in the Court of Appeals.

II

RULES AS TO WRITS OF CERTIORARI APPLICABLE.

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 10, 1950 (Appellee's Appendix 38). The petition for writ of certiorari was filed September 19, 1950, and notice thereof served on the appellee on September 22, 1950; the jurisdiction of this Court being invoked under Title 28, U.S.C., Section 1254(1), subject to rules regulating the granting or refusing of writs of certiorari.

III

SOLE QUESTION PRESENTED BY THE PETITION

The "sole question" presented, according to the Petition, is whether "the Courts below" (i.e, the District Court of the United States for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit) *"deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely, a jury trial,* by weighing the contradictory evidence, drawing inferences, judging the credibility of witnesses, and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury." (Italics supplied.) See heading "C", p. 2 of the Petition.

Under heading "D" of the Petition, p. 3, giving the "Reasons Relied On For Allowance Of The Writ", the fact is emphasized that the right of "a jury trial" (as distinguished from a trial by the Court and jury) is the only question presented by the petition. We quote from the petition:

> "The United States Court of Appeals for the Fourth Circuit has rendered a decision in probable conflict with applicable decisions of the Supreme Court of the United States *involving the right of petitioner to a jury trial under the Federal Employers' Liability Act*". (Italics supplied.)

So that the "sole question" presented in this petition for a writ of certiorari, is whether the plaintiff is entitled to a jury trial under the Federal Employers' Liability Act, notwithstanding it may appear from the evidence as a matter of law, that any verdict rendered thereon for the plaintiff would be or is (as held in the present case by the two courts in question) not only contrary to the law and evidence, but without evidence whatsoever, direct or circumstantial, to support it.

Not unless "the applicable decisions of the Supreme Court of the United States" support any such ground as that above *specified*, is a certiorari available. Rule 38, paragraph 2 of the Supreme Court provides as follows:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

It will be noted that after *specifically* bringing forward the "right of the petitioner to a jury trial under the Federal Employers' Liability Act", as being the "sole question" presented, the petition goes on to state how the petitioner

was "deprived" of the right by the "courts below", to-wit, "by weighing the contradictory evidence, drawing inferences, judging the credibility of witnesses and drawing ultimate conclusions as to the facts contrary to those drawn by the jury".

(1) If there could be language more abstract, more general and less specific than that last above-quoted from the petition, it is difficult to conceive what the language could be. In fact, it is respectfully submitted that the language is merely a "rhapsody of words" made over a "body of contraction"—that body of contraction being the alleged right of trial by a jury alone and not by court and jury as in all other negligence cases.

(2) Apart from the generality of the foregoing language, this unwarranted broadside against the trial court and the Court of Appeals of the Fourth Circuit, is annexed as a relative clause, argumentative in character, relating only to the alleged means by which "the courts below deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely, a jury trial." (Petition p. 2.)

(3) The general words contained in the foregoing quotation from the petition were taken largely from language used *arguendo* in *Lavender* v. *Kurn*, 327 U. S. 651, 652-653, and have no relevancy to the present case. The present case turns on the testimony of a single witness on a single, simple question of undisputed fact, and that witness being the plaintiff's (Petitioner's) own witness, all of which will be more fully shown below.

Thus, it appears that the only question "*specifically* brought forward by the *petition* for writ of certiorari" (Rule 38, par. 2, cited *supra*) is the alleged right of a "jury trial", without the intervention of the court, in any

and all actions brought for damages by a railroad worker under the Federal Employers' Liability Act.

Unless therefore a trial court is *absolutely* deprived of the right in such cases to direct a verdict, where the verdict is not only contrary to the law and evidence but without any evidence whatever to support it, then no certiorari should be granted in this case.

However, the right of a trial court to direct a verdict in a proper case in this class of cases, is not only settled by many recent decisions rendered by this Court; but this fact is conceded in the "Summary of Argument", contained on page 7 of the brief in support of the petition, where this is said:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away the goodly portion of the relief which Congress has afforded them. Only where there is a complete absence of probative facts to support the conclusion reached may the court take the case away from the jury."

1. In the first place, it will be noted that the exception contained in the brief accompanying the petition, is not contained in the "Sole question presented" in the petition; and that Rule 38, paragraph 2, above cited, provides that only the questions specifically brought forward by the *petition* for writ of certiorari will be considered.

Obviously, it would be requiring an improper and onerous burden, and one incapable of accurate determination, to impose upon the court the duty to search the briefs to determine what was the specific question intended to be presented by the petition. *Southern Power Co.* v. *North Carolina Public Serv. Co.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. ed. 413. This, no doubt, is the reason for the establishment of the rule above cited.

2. In the second place, despite the assertion in the petitioner's brief to the contrary, the present case comes within the very exception mentioned in the brief, where the court may take the case away from the jury, namely, "where there is a complete absence of probative facts to support the conclusion reached." That there was a complete absence of any evidence to support the plaintiff's case, was upon mature deliberation definitely adjudicated by the District Court, and on appeal therefrom to the Court of Appeals for the Fourth Circuit, this judgment of the District Court was affirmed as being "clearly right". Moreover, such a conclusion will, we submit, be convincingly established by an examination of the record.

In fact, the brief accompanying the petition itself indicates a consciousness of the justice inherent in the decisions of the two courts below and the unassailable character of their conclusions. Otherwise, there would be no occasion (1) for the misstatements, as well as inaccuracies of fact contained in the petitioner's brief, as will be hereinafter shown; and (2) for contending at the conclusion of the brief (p. 26)—contrary to the above-mentioned concession in the "Summary of Argument"—that "negligence and proximate cause" are in this class of cases treated as questions for the jury; that on these issues "its decision is unassailable", and that it would be "difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict."

IV

SUMMARY STATEMENT OF MATTER INVOLVED INSUFFICIENT

Rule 38, par. 2, provides that—besides "the questions presented" and "the reasons relied on for the allowance of the

writ"—"the petition shall contain a summary and short statement of the matter involved." And adds thereto the following provision:

> "A failure to comply with these requirements will be a sufficient reason for denying the petition."

The "summary statement of the matter involved", is under heading "B" p. 2 of the petition. It states that plaintiff's decedent lost his life in the performance of his duties as a brakeman of The Chesapeake and Ohio Railway Company, while both he and the Company were engaged in interstate commerce; that he left a widow and four small children ranging in ages from three to ten years; that she qualified on his estate and sued the Company for damages under the Federal Employers' Liability Act; that upon the trial of the case in the District Court, the jury rendered a verdict for the plaintiff in the sum of $34,000.00; that upon motion of the defendant the verdict was set aside upon the *sole* ground that it was contrary to the evidence; that final judgment was entered for the defendant; and that this judgment was affirmed by the Court of Appeals in an opinion rendered on the 10th day of August, 1950 (Appellee's Appx. 33-38).

This statement of the "Matter Involved" is (1) not only manifestly insufficient to show what is the matter involved, but (2) is inaccurate and erroneous in its statement as to what happened upon the trial of the case.

(1)

The Singleness and Simplicity of the Matter Involved Obscured by the Summary Statement in the Petition

The statement as to the matter involved significantly omits any reference to the pleadings; and that the complaint alleged

only one specific ground of negligence, namely, that the plaintiff's decedent, while acting as brakeman for the defendant in a yard switching movement and located "in a position of safety on the rear of the tender" of a locomotive, was caused to be thrown to the ground by the sudden application of the brakes in emergency, in a "hitherto unprecedented and unexpected change in the manner of shifting cars", and without proper warning or signal to the decedent, who was thereby fatally injured (Appellant's Appx. 2-3).

An additional general allegation of negligence "in other respects and particulars", was stricken by the Court from the Complaint, on defendant's motion, after plaintiff had failed to furnish a more definite statement of such negligence (Appellee's Appx. 28-29). There was no allegation of any negligence with respect to the footboards on the locomotive tender, or as to the brakes, or any other appliances or appurtenances connected with the locomotive or group of cars attached to it. And no violation of any safety appliance acts is in any way involved in this case.

Defendant's answer denied any negligence on its part; denied that the decedent was thrown off the tender by any application of the engine brakes; denied there was any change made in the manner of shifting cars, or that any sudden stop was made while decedent was on the tender. It averred that the decedent, as an experienced brakeman, had full knowledge of the engine movements being made and the physical situation, and further averred that his injuries were solely due to an accident which could not have been reasonably foreseen or anticipated by the defendant, etc. (Appellee's Appx. 1-3).

That the sole question on which the case was submitted by the Court to the jury (under Rule 50 of the Federal Rules of Civil Procedure), was the single specific issue indicated

above, is shown by the concluding portion of the trial court's charge, to which there was no objection or exception by either party, where the Court said (Appellant's Appx. 12-13):

> "The issue which you have before you is very narrow. It boils down to this: If you believe from the evidence that Mr. Moore was thrown from the tender as the result of the sudden stop or violent jerk which resulted from the unexpected application of brakes, then you may conclude that the defendant railroad Company is liable for negligence. On the other hand that is the only charge of negligence contained in the Complaint. Unless you believe that, your verdict should be for the defendant."

Only one person testified as to how the decedent was injured and the circumstances surrounding it, and so far as known, he was the only eye-witness of the accident. This was the locomotive engineer (Wilds). He was put on the stand by and testified as a witness for the *plaintiff* (appellant), and not even as an adverse witness, as is stated in the petition. (See Appellee's Appx. 4.)

Wilds' testimony was unequivocally and emphatically, not only to the effect that *the brakes did not go on the locomotive and train until after the plaintiff's decedent fell, but that he personally saw the plaintiff's decedent fall, and applied the brakes himself subsequent to, and solely because of, the decedent's fall.* There is no contradiction of Wilds' positive testimony in the record, either direct or circumstantial. On the contrary, the circumstantial evidence, as will hereinafter be shown, confirms the testimony of Wilds.

(2)

The Summary Statement is Erroneous and Misleading As to the Nature and Character of the Trial Proceedings

The "Summary Statement of Matter Involved" is also erroneous and misleading as to what happened upon the trial of the case, wherein the following statement is made:

> "Upon motion of the defendant, the verdict was set aside upon the *sole* ground that it was contrary to the evidence, and final judgment was entered for the defendant."

In this connection, it is to be remembered that there was only one witness, and that one introduced by the plaintiff, *as to the single fact in issue, namely, whether the brakes were put on the train before or after the decedent's fall.* That witness was the locomotive engineer, Wilds, and he was the only known eye-witness to the accident, as above shown. We have also shown that Wilds testified, positively and unequivocally, that he *saw* the decedent fall or "tumble" from the footboard of the tender before the brakes were put on the train; *and that he personally applied the emergency brakes subsequent to and solely because of, the decedent's fall*—an action by Wilds which "humane feelings required", as stated in the opinion of the Court of Appeals (Appellee's Appx. 35).

In the memorandum opinion of United States District Judge Sterling Hutcheson, this is said (Appellant's Appx. 5):

> *"To sustain a verdict in this case it would be necessary to believe that the sudden stop was made before the plaintiff's decedent fell,* and *there is no evidence of any kind to support this contention."* (Italics supplied.)

After citing certain decisions of this Court, such as *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Lavender* v. *Kurn*, 327 U. S. 645 and *Tennant v. Peoria*, etc. R. Co., 321 U. S. 29, the opinion of the learned judge continues as follows:

> "* * * As I understand the cases, there must be shown some act or conduct from which it is reasonably possible to infer negligence.
>
> "Applying this test to the facts of the instant case, it is my opinion that *there is no evidence upon which the question of negligence* should have been submitted to the jury." (Italics supplied.)

In the opinion of the Court of Appeals, this is said (Appellee's Appx. 35):

> "We hold that the District Court correctly sustained Appellee's motion for a directed verdict. We find in the record no evidence sufficient to support an inference of any negligent act on the part of the engineer, or that his stopping the train caused Moore to fall."

And, again (Id. p. 38):

> "No fact was brought to light which could support an inference that the engineer stopped the train for any reason other than that which he gave in his testimony."

Consequently, the petition is not only plainly inaccurate but grossly misleading where it states that "Upon motion of the defendant, the verdict was set aside upon the sole ground that it was contrary to the evidence."

The impression the petition is evidently intending to convey is, that the trial court was "weighing the contrary

evidence, drawing inferences, judging the credibility of witnesses and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury," (as stated generally in the petition pp. 2-3, under heading "Question Presented"). Nothing could be more misleading than this misstatement contained in the petition.

There was no evidence contrary to the testimony of plaintiff's own and sole witness (Wilds) as to the single fact in issue, namely, whether the brakes were put on the train before or after the plaintiff's decedent fell from the footboard of the tender; and Wilds testified that he personally put on the brakes after the decedent fell, as above shown. And the Court did not set aside the verdict upon the sole ground that it was contrary to the evidence, as stated in the petition. What the Court did was to direct a verdict for the defendant, *non obstante veredicto*, "acting pursuant to Rule 50 of the Federal Rules of Civil Procedure", on motions duly made by the defendant, on the ground that *"there is no evidence to support the plaintiff's allegation of negligence upon the part of the defendant."* (Italics supplied.)

This is conclusively shown by the judgment itself (Appellant's Appx. 6).

V

STATEMENT OF THE CASE

The opinion rendered by the Court of Appeals for the Fourth Circuit, contains an accurate summary of the essential facts established by the evidence, which statement we adopt for the respondent. The petitioner's brief contains no separate statement of the case. However, in the course of the petitioner's argument, particularly on pages 10, 19, 20 and 21 of her brief, various misstatements and incomplete

quotations of the evidence are made and repeated, and a number of unwarranted inferences are drawn therefrom. This makes it necessary to call attention to certain additional testimony not referred to in the Court's opinion.

Wilds' undisputed testimony is, as hereinbefore indicated, that the brakes were not put on the train until he saw Moore fall, and that he personally applied the brakes himself on account of and solely because of that fact (Appellee's Appx. 8, 10; Appellant's Appx. 26-27, 29); and that the train was going at a speed of only five miles an hour at the time of the accident. Nobody purported to say that any of this testimony was untrue.

Wilds also testified that Moore remained standing in the "same place", on the same footboard of the tender, from the time he gave the original back-up signal to start the train movement until he fell from the footboard (Appellee's Appx. 7-10, 12-13; Appellant's Appx. 21); that he himself "was leaning out" of the engine cab to see the switches ahead and "any signals which he (Moore) might give" (Idem). He said that Moore was *continuously* in his view up to the time he fell; that he could see "the edge of his shoulder and arm", and had no trouble keeping him in sight (Appellee's Appx. 12-14). He also verified that the man shown on the footboard in the picture, Defendant's Exhibit "B" (Appellee's Appx. 13-14; Original Record 145) taken facing the rear of the tender of No. 114, with himself in the cab, illustrated what was Moore's position on the footboard.

The testimony of this witness further showed that the movement of the train was in accordance with the regular routine of duty; that the cars had been pulled about ten carlengths in a westerly direction, during which time Moore had been occupying the customary position of a brakeman; that there had been no rough handling of the cars or jolting of the train; that a brakeman stands "on the edge of the

footboard" and "they give a signal, and you can see it; that "he has to get out in view where you can see his hand", and that "if he stood behind the tank where you couldn't see the signal, there would be no reason to give it" (Appellee's Appx. 7, 9; Appellant's Appx. 16, 23-24). He said that he (Wilds), in approaching No. 12 switch, could see that it was properly fixed for his movement into the ladder or lead track, and Moore had the same view (Appellee's Appx. 9, 10); that neither Moore nor anyone else, had given any signal to him to stop and nothing had happened to cause him to make any stop, until he saw Moore fall off (Appellee's Appx. 5, 8); that Moore was not giving any signal when he fell off, and there was no reason for him to be getting off, at that point (Appellee's Appx. 8); that the object of the train movement was to get the cars on the ladder track for switching purposes and he had expected to keep pulling the cars until he received a signal (Appellee's Appx. 5-6). He said it was not necessary for him to get any signal or "O.K." from a switch tender, or to give any notice to anyone, before coming out on the ladder track, and that he did not recall a switch tender or anybody being at the switch stand (Appellee's Appx. 15; Appellant's Appx. 30).

Wilds also testified that Moore, in falling from the footboard, came "tumbling off", "right at the step of the tender", on the outside of the rail, and "about six or eight inches from it." (Appellant's Appx. 26-28). He fell off at a point east of the switch, before the engine went through it (Appellee's Appx. 16).

Moore was thirty-two years of age. He had been brakeman and conductor for over six years (Appellant's Appx. 13-14). Wilds had been an engineer since 1929, and had worked with Moore on a number of other occasions at the Fulton Yards (Appellee's Appx. 5, 16).

Plaintiff's witness Torrence, upon being shown Defendant's Exhibit "B" (Appellee's Appx. 13-14; Original Record 145), the picture taken facing the rear of the tender of engine No. 114, with the man standing on the footboard holding to the handrail or grabiron, commented: "The man shown here is not balanced. * * * *He is holding onto the grabiron here.* Of course, he could stick out much further than that if he had chosen to lean out further, supporting himself by his arm." "He is supported by lateral force." He said that in the tests which he made, "we assumed" that a man on the footboard "would be balanced on his own two feet", and in an "upright" position (Appellant's Appx. 40-41, 44). He said nothing about whether such a man would hold to the handrail or grabiron, which an experienced man like Moore, acting in his line of duty, would naturally be doing, in order to be on the alert and "balanced", so as to give a signal from the moving train, if and when such a signal became necessary. Torrence admitted that he never operated an engine, and there was nothing to show that he had ever participated or had any experience in railroad yard switching operations (Appellee's Appx. 22). Had Moore been standing "upright" on the footboard, balanced "on his own two feet", as assumed by the witness Torrence—and it is merely a hypothetical assumption, since Torrence was not a witness to the evidentiary facts of the transaction, either direct or circumstantial—he would not have fallen outside the rail of the track, about six or eight inches therefrom (Appellant's Appx. 28), and at an angle thereto, as he did; but if he had been in such a position as assumed by Torrence, he would obviously have fallen between the rails of the track.

VI

SOME ASSERTIONS AND INFERENCES OF FACT IN PETITIONER'S BRIEF WHICH ARE CONTRARY TO AND UNSUPPORTED BY THE TESTIMONY

On pages 9, 20 and 21 of petitioner's brief, it is asserted that Moore "was standing behind the tender" on the footboard in such a position that Wilds could not see him, unless he "was reaching out from behind the tender giving a signal." This is directly contrary to Wilds' positive testimony that the edge of Moore's shoulder and arm were *continuously* in his view from the time he gave the back-up signal from the footboard, until he fell off.

It is also claimed on pages 10, 19 and 21 of petitioner's brief, that Moore could not give a signal, except when he was "reaching out from behind the tender" (i.e. as if from an unseen position). This too is contrary to the same evidence and to Wilds' testimony that a brakeman in such an assignment, "stands on the edge of the footboard", where he can see signals and from where his signals can be seen. Also in conflict with the same evidence, is the statement on page 17 of petitioner's brief, that "there is no evidence that Moore was standing in any such position", meaning the position of the man shown on the footboard in the picture, Defendant's Exhibit "B".

In seeking to find a possible cause for Wilds applying the emergency brakes (other than the fact that Moore was seen by him to have fallen off), the theory is suggested, on pages 19 and 21 of petitioner's brief, that Wilds, not knowing whether "they intended" to take all thirty-three cars out through the switch at one time, or "to stop and cut a part of them off," and not seeing a switch tender and not getting a signal from Moore, suddenly decided to make an emer-

gency stop to find out, and did so. Such a suggestion is directly contrary to the humane cause stated by Wilds. It also ignores both the fact that the movement being made was the first move with the engine coupled to the cars, and also Wilds' statement that he was intending "to keep pulling the cars back until I received a signal" and until he "cleared" the No. 12 switch and "probably beyond" (Appellee's Appx. 5-7, 15). It also disregards his statements that he did not have to get any signal from a switch tender or anyone at the switch; that there was nothing approaching from the opposite direction, and that he could see that the switch was properly lined for his engine. Furthermore, the act suggested would have been a most unnatural one for any experienced engineer during a normal switching movement.

The answer given by Wilds to the effect that Moore "was not in position to give him any signal if the switch was not in place", is twice cited on page 10 of petitioner's brief, as a condition applying to the entire period during which the back-up train movement was being made, a distance of some ten car lengths. However, the complete context of this question and answer (Appellee's Appx. 12-15), plainly shows that they relate only to the situation existing after Moore had fallen from the footboard. Wilds had already clearly stated in previous answers, how Moore remained in view and was in position, as was his duty, to give signals to him, if needed, while standing on the footboard, and had actually given the back-up signal from the very location (Appellee's Appx. 12-13). The manifest object at this stage of the questioning, was to ascertain whether there could be any reason for Wilds, in nearing the switch, to make an emergency stop, other than the fact of Moore's fall. And Wilds testified that there was no other reason. (The Complaint had alleged "a hitherto unprecedented and unexpected change in the manner of shifting cars, i.e., that a sudden stop was to be made

at the lead track", without warning to Wilds). Wilds did not say, as seems to be contended, that Moore was in a position of invisibility so far as he was concerned, but on the contrary, in a position where he could not give any signal. Certainly Moore was in that sort of position, when, lying outside of the rail and flat on his back, Wilds saw him and applied the emergency brakes. Had Moore been on the footboard but out of sight, Wilds would not know whether he could give a signal or not; and if in such position, he would have been absent from his post of duty, which not only cannot be assumed; but, in fact, the presumption is to the contrary, *Tennant* v. *Peoria, etc. R. Co.*, 321 U. S. 29, 34, 88 L. ed. 520, 524.

On pages 17 and 18 of petitioner's brief, a contention is made for the first time in this litigation, that defendant's picture, Exhibit "B", is "distorted"; that the view represented "was not correct", and was taken from an angle which "makes it appear that the engineer could see more than he could in fact see." The original record, as well as the Appendices used in the Court of Appeals, disclose no objection whatever to have been made to this picture in either court below. The picture shows on its face that it was taken from a position closely in line with the edge of the tender and in no sense enlarges the actual view of the engineer in the cab of Engine No. 114, the particular engine involved. Thus, only a number of projecting bolt or rivet heads are visible along the side of the tender, whereas had this picture been taken at an angle away from the track, the entire surface of the side of the tender would be disclosed. As reproduced and inserted between pages 16 and 17 of petitioner's brief, this exhibit is in the form of a "photolithograph", or a picture of a picture. Parts of it have been cut off in the foreground at the bottom and on both sides. It is misleading because it is not as clear and presents a smaller background

than the picture actually introduced. A print made directly from the original film, which is an exact duplicate of the picture as introduced at the trial and included in the original record at page 145, is therefore herewith inserted in the interest of accuracy.

On pages 14 and 15 of their brief, counsel for petitioner attempt to describe in detail certain alleged physical positions and demonstrations of the witness Wilds, while he was testifying before the trial court. In support of such description, they cite no evidence contained in the record, but offer only their own personal observation of what transpired. Manifestly, this is not legal proof, even though it is accompanied with an assertion that at that particular time, "Counsel did not lay hands upon him (Wilds) and press him straight down * * * and raise him straight up."

On page 31 of Appellant's Appendix it is indicated by a break in the testimony quoted, that the conductor, Luther Holland, was riding on the tender when the train movement began. This is incorrect, as is shown by the full quotation of this testimony on pages 6 and 7 of Appellee's Appendix.

VII

ARGUMENT

No Self-Contradiction Created by Answers of Witness Wilds to "Standing-Up-Straight" Questions

The foundation stone of the petitioner's entire argument is, that in the series of questions and answers quoted at the bottom of page 12 and top of page 13 of her brief, the witness Wilds, in acquiescing in her counsel's use of the phrase "standing up straight", as applied to Moore's position on the footboard when seen by him as the train moved along,

thereby contradicted himself completely, since the nearest edge of the footboard was ten inches inside the edge of the tender, and hence the conclusion may be drawn that Wilds could not see him at all until he had fallen off.

It will be recalled that Wilds did not claim to be able to see Moore's entire body, but only the edge of his shoulder and his arm. This was not enough of his body to affirm that he may not have been leaning more or less toward the left side. He did know that there was a handrail (grabiron) extending across the entire width of the tender, and that it was entirely appropriate for Moore to brace and support himself by means of this safety device—as indicated in the picture, Defendant's Exhibit "B". His answers to the questions should therefore be construed accordingly. Also, in the same series of questions, both the witness and counsel referred to the fact that Moore, just before falling, got in a "slumped" position, "as if his knees gave away"—as contrasted with his previous position when standing prepared to give a signal if needed. There was a difference between these two positions which was most significant to Wilds.

So far as concerns the candid admission made on page 15 of petitioner's brief that the "standing-up-straight" phrase was supplied and suggested entirely by her counsel's questions, had negative answers been given by Wilds to these questions, the same counsel would undoubtedly have protested that the witness was being unreasonably meticulous, arbitrary and over literal. Of course the witness was testifying as a practical railroad operating man, rather than as a precise physicist, mathematician, or expert on "semantics". The objection here, as pointed out in the opinion of the Court of Appeals, is not as to the words suggested, but to the "strained and forced interpretation" of them, "when they admit of a natural, ordinary colloquial construction", which the witness unquestionably had in mind in his assent

to their use by counsel. The self-contradiction sought to be inferred against the witness would be violative of fundamental principles of sound reasoning and just judgment. It involves the logical absurdity of trying to prove that Wilds could not see Moore by Wilds' own testimony that he could see him! And that, too, merely by a play upon words. Hamlet had this kind of "verbal gymnastics" in mind when examining a skull thrown up by a grave-digger, which he supposed to be that of a lawyer, asks—evidently with a layman's disapproval of such unfair technique—"Where be his *quiddits* now, his quillets, his cases, his tenures and *his tricks*?" No wonder therefore, the Court of Appeals calls attention to the disfavor with which the law looks upon such casuistry.

Thus, as stated by the Court of Appeals, the evidence of Wilds "fairly interpreted, shows, without contradiction, that he *could* see" Moore; and, accordingly, his testimony was in no wise self-contradictory.

The testimony of Wilds is not only uncontradicted by any evidence whatsoever, direct or circumstantial, but is corroborated by an undisputed fact, which when justly evaluated, confirms the testimony of Wilds to the effect that the catastrophe which befell Moore was the result of a *casus fortuitus* —an unforeseeable accident—and that, *specifically*, it was due to a heart condition, the serious nature of which was apparently unknown to any one, not even to Moore himself or his family.

This fact is referred to in the opinion of the Court of Appeals, where this is said:

> "Appellee with corroboration from appellant, who was examined as a witness in her own behalf, proved that Moore had suffered a coronary occlusion thirteen months before his death, which, in the opinion of the

attending physician at the time of treatment, was thought likely to recur. The physician who examined the body at the undertaker's establishment certified that death was due to the injuries sustained in the fall. No autopsy was made to determine whether there were signs of recurrence of the heart condition."

Again, the opinion of the Court of Appeals, in referring to the words "standing up straight", makes the following observations, the correctness of which are now admitted in the brief of the counsel for petitioner:

> "It is worthy of note that these were the words of counsel, and not of the witness. They were carefully framed, for no other apparent purpose than to provide an excuse to contradict the engineer's testimony."

The following citation from the opinion delivered by Hudgins, J. (now Chief Justice), in the case of *Butler* v. *Parrocha*, 186 Va. 426, 435, 43 S. E. (2d) 1, is peculiarly pertinent in this connection, where, after showing that the plaintiff's counsel knew that the witness' testimony would be adverse to the plaintiff's theory of the case, and, hence, could not claim they were surprised at the testimony of the witness, the court said (quoting with approval from the decision of Judge Hutcheson of the United States Court of Appeals, 5th Circuit, in *Young* v. *U. S.*, 97 F. (2d) 200, 117 A.L.R. 316):

> "'The overwhelming weight of authority, however, supports the rule that, though trial courts should in the exercise of a sound discretion to prevent injury from the surprise testimony of a hostile or corrupt witness, permit cross-examination and impeachment by contradictory statement, it is never permitted to make of the rule an artifice by which inadmissible matter may be

> gotten to a jury through the device of offering a witness whose testimony is known to be adverse, in order under the name of impeachment to get before the jury for its weighing favorable *ex parte* statements the witness has made."

The impropriety of the artifice is of course doubly applicable where the statements of the witness are not favorable to the party examining him at all, or can be held favorable only by "a strained and forced interpretation when they admit of a natural, ordinary colloquial construction."

The Fact That the Witness is Adverse to the Plaintiff Does Not Relieve the Plaintiff Of the Burden of Proof

Apart from the fact, as above shown, that the testimony of Wilds is in no wise discredited in this case, the Court of Appeals justly observes that the fact that Wilds was an employee of the appellee and a witness whom appellant was compelled to call to prove her cause, "did not relieve her from the burden of producing affirmative evidence from which an inference of negligence could be drawn."

In *Eckenrode* v. *Penn R. Co.*, 3rd Cir., 164 F. (2d) 996, aff'd. 335 U. S. 329, (cited in the opinion of the Court of Appeals), where all the plaintiff's witnesses were employees of the defendant and by leave of the trial court, put on the stand by the plaintiff as adverse witnesses, the Court stated in a footnote, that although the plaintiff was not bound by their testimony, yet "belief that testimony is false will not support an affirmative finding that the reverse of that testimony is true. Plaintiff has the burden of establishing his case by direct or circumstantial evidence; that burden is not met by pointing to the fact that all the available witnesses are hostile and will not testify in a manner which would support the complaint."

See also the cases therein cited, among them *Cruzan* v. *N.Y.C.&H.Riv. R.R.*, 227 Mass. 594, 116 N. E. 879, likewise a Federal Employers' Liability case.

In *Bunt* v. *Sierra Butte Gold Mining Co.*, 138 U. S. 483, 11 S. Ct. 464, 34 L. ed. 1031, a negligence case wherein the plaintiff had put on the witness stand the employees of the defendant company who were the only witnesses of the accident, the Court sustained the action of the trial court in directing a verdict for the defendant, and in an unanimous opinion, speaking through Mr. Justice Gray, the Court said:

> "The suggestion that because the only witnesses of the accident, and whom therefore the plaintiffs were compelled to call, were in the defendant's employ and might be prejudicial in its favor, the question how far they were biased should have been submitted to the jury, is of no weight. Theirs being the only testimony on the point, disbelief of their testimony could not supply a want of proof."

It is therefore not necessary to show in this case that Wilds was not put on the witness stand as an adverse witness by the plaintiff. Plaintiff's counsel made a motion for leave to do so, but the trial court acting in its sound discretion, overruled the motion of plaintiff's counsel to be allowed to treat the witness as an adverse witness "unless he were first shown to be adverse" (Appellee's Appx. 4); and the witness was never thereafter shown or claimed to be shown as an adverse or hostile witness by the plaintiff. Hence, plaintiff must be taken as having abandoned such a claim.

However, plaintiff's counsel was given the fullest liberty to treat the witness as an adverse witness and to cross-examine the witness by asking leading questions, even to the extent of putting "words in the mouth of the witness" as is

unequivocally confessed, and even defiantly proclaimed in the petition (p. 15). So that if Wilds came within the provisions of Rule 43(b) of the Federal Rules of Civil Procedure to the effect that "a party may interrogate any unwilling or hostile witness by leading questions," the appellant is in no position to complain of any restrictions in this respect, or in any other respect, in this case. Moreover, no such complaint is made in the petition.

It may not be amiss, however, to call attention to the fact that in the most recent case in Virginia on the subject, it is definitely indicated that the determination of such matters rest in the sound discretion of the trial court and that the Virginia and Federal rules on this subject are practically identical. See *Butler* v. *Parrocha*, 186 Va. 426 (1947), 43 S. E. (2d) 1, cited *supra*.

No Unfavorable Presumption from Alleged Failure of Defendant to Introduce Conductor Holland as a Witness

Apart from the fact that conductor Holland was not at the scene of the accident and was not an eye-witness thereto, no unfavorable inference against the defendant, as claimed in petitioner's brief (p. 22), can be drawn from the alleged failure of the defendant to introduce Conductor Holland as a witness, for the following reasons, and upon the following well-established grounds, to-wit: (1) No such inference can be allowed to arise where the plaintiff has not made out any prima facie case or any case at all; for the reason that such a presumption cannot be used to relieve the plaintiff of the burden of proving his case; and (2) Conductor Holland was summoned by the plaintiff and was present to testify as a witness "on behalf of the plaintiff" at the trial. See *praecipe* and subpoena with return thereon (Appellee's Appx. pp. 29-31).

(1)

No Prima Facie Case Made Out By The Plaintiff

The case of *Puckett* v. *Draper*, 158 S. E. 68, 156 Va. 238, cited at p. 22 of the petitioner's brief, was a case involving an alleged fraudulent conveyance, and in which the voluntary nature of the conveyance furnished a badge of fraud, and therefore established a prima facie case for the complainant.

A Virginia case more appropriate in this connection, is that of *Arnold* v. *Wood*, 173 Va. 18, 24, 3 S. E. 2d, 374, where on a demurrer to the evidence, in an automobile accident based on alleged negligence of the defendant, the Court said:

> "It is argued on behalf of the administratrix that, since the defendants failed to call the truck driver as a witness, there is a presumption that the latter was guilty of negligence. The answer is that until the plaintiff made out a prima facie case there was no duty on the defendants to bring forward any evidence or to call any witness on their behalf.
>
> "In *Hendricks* v. *Virginia Electric & Power Co.*, 161 Va. 793, 799, 172 S.E. 160, 162, we said:
>
> 'It is contended that presumptions unfavorable to the defendant exist because the motorman was not called as a witness. This rule does not apply where the plaintiff, bearing the burden of proof, which the law places upon him, has made out no case at all.
>
> 'There is no presumption against a defendant for failure to call witnesses when the plaintiff carrying the burden of proof has not made a prima facie case and such presumption cannot be used to relieve the plaintiff from the burden of proving his case.' "

See, to the same effect, 1 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 22, p. 53; and 2 Wigmore on Evidence (3d ed.) Sec. 290, pp. 179-180.

(2)

Conductor Holland, a Witness in Behalf of Plaintiff

Since Conductor Holland was summoned by and present as a witness for the plaintiff, and since the burden of proof of negligence was upon the plaintiff, and since the plaintiff did not put him on the stand, if there is any adverse presumption at all arising from such circumstances, that presumption is plainly against the plaintiff. As in the case of, *In re King David,* we might quote the words of condemnation by plaintiff's counsel, contained on page 22 of petitioner's brief, and replying in the language of the prophet Nathan, justly observe: "Thou art the man!"

In 1 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 21, p. 51, this is said:

> "An adverse inference does not arise from a failure to call as a witness one whom the other party had the same opportunity of calling."

See, also, 53 Am. Jur. 531; *De Pascale* v. *Penn. R. Co.,* 180 F. 2d, 825, 827.

Further comment seems unnecessary.

View

Where there is no evidence to support the plaintiff's case, as here, it is a favorite device of counsel for the plaintiff to claim that such deficiency is supplied by the view of the premises and property or instrumentalities involved, made

by the jury. This case, it appears, is no exception to the rule. Thus, it is said that "There was evidence which the jurors saw upon their own inspection" (petitioner's brief, p. 21); and that "Their verdict indicated the result of their own observations and tests" (Id. p. 20).

Since there is no pretension that there was any defect in the engine, tender or appliances connected therewith, and it is admitted, in effect, in the plaintiff's complaint that the defendant had furnished decedent a "position of safety" in which to work; since, further, detailed measurements of the engine and tender of Engine No. 114, were given by plaintiff's witness Torrence (Plaintiff's Exhibit No. 6, Appellant's Appx. 35-43); and since, still further, the plaintiff as well as the defendant, filed pictures of engine No. 114, in evidence (Appellant's Appx. 19), it is difficult to see how the jury, the Court, or the counsel, could have derived any greater information by a view than that which they already had. Cf. *C&O Ry. Co.* v. *Nickel*, 157 Va. 382, 161 S. E. 248; 64 C. J. Sec. 90, p. 89.

Again, by no possibility could a jury reasonably determine from a view of engine No. 114, whether decedent tumbled off the footboard of the tender prior or was thrown off subsequently to the application of the emergency brakes thereon, which is the sole question at issue in this case.

Moreover, the law is firmly established that a jury cannot base their verdict "on the result of their observations and tests" unsupported by the other evidence in the case, and the sworn testimony of witnesses.

Thus, in 2 Jones on Evidence (4th ed.), Sec. 408, p. 768, this is said:

> "Although a jury may properly act upon an inspection or view as evidence in the case, they are not justi-

fied in acting solely upon such evidence and in disregarding the other evidence; and if their verdict is not supported by the other evidence it cannot stand."

In 53 Am. Jur., subject Trial, Section 451, p. 354, after alluding to the divergence among the cases as to whether a view can be regarded as evidence or not, states that even the rule that the jurors may consider knowledge acquired by them on a view as evidence and act thereon accordingly is "subject to the qualification that such evidence by itself and in the absence of other evidence tending to sustain the issue is not sufficient to sustain a verdict or finding."

In the present case, the principle of law set out in the foregoing authorities has the added sanction of the trial court's ruling in setting aside the verdict of the jury and entering up judgment for the defendant in accordance with its motion for a directed verdict under Rule 50(b) of the Court.

VIII

AUTHORITIES

An examination of the cases relied upon in the petitioner's brief enforces the conclusion that not a single one discloses sufficient factual similarity as to have any bearing on the present case; the cases referred to being *Lavender* v. *Kurn*, 327 U. S. 645, 66 Sup. Ct. 740; *Gray* v. *Southern Pacific Company*, 145 P. 2d, 561; *Tennant* v. *Peoria etc. Ry. Co.*, 54 Sup. Ct. 409; *Kurimsky* v. *Unity Rys. Co.*, 55 A. 2d, 378; *Stanford* v. *Penn. R. Co.*, 171 F. 2d, 632.

In none of the foreging cases was there positive direct testimony of an eye witness of the accident, as in the case at bar, whose uncontradicted testimony showed that there was no negligence on the part of the defendant whatsoever. All

the foreging cases were cases of circumstantial evidence, in which the respective courts held that there was evidence from which it might reasonably be inferred that the defendant was guilty of negligence, and that such negligence was the proximate cause of the accident. In both of the U. S. Supreme Court cases, namely, *Lavender* v. *Kurn*, and *Tennant* v. *Peoria*, the trial courts had overruled motions by the defendants to direct a verdict, and entered up judgments for the plaintiffs. Here the trial court set aside the verdict and entered up judgment for defendant under Rule 50 of the Federal Rules of Civil Procedure, in accordance with the motions to direct a verdict duly made by the defendant. And such action of the trial court was affirmed by the Court of Appeals.

In all of the foregoing cases cited by the petitioner, there was evidence to show that the plaintiffs, or plaintiffs' decedents, were negligently injured by and through some agency or instrumentality of the respective defendants. Here there was no negligence at all, and no evidence from which any negligence might reasonably be inferred; the uncontradicted evidence showing that the fatal injury to the plaintiff's decedent was not occasioned by or through any agency or instrumentality of the defendant, but that the agencies and instrumentalities of the defendant were merely the conditions under which the decedent fortuitously fell from the footboard of the tender, as has been hereinbefore fully shown.

In short, there is but one single fact in issue in the present case, and that is whether the brakes were put on the train before or after the plaintiff's decedent fell; and (without weighing the credibility of witnesses, since there is no testimony by any other witness on that subject than the plaintiff's own witness, engineer Wilds) it is respectfully submitted, that there is in the evidence, no room whatever for an honest difference of opinion on that single, simple issue.

namely, that the brakes were not put on the train until Wilds saw the plaintiff's decedent fall; and that Wilds out of natural humanitarian motives, set the brakes in emergency himself, because of, and solely on account of the fact of the decedent's fall—a fact which took place before Wilds' own eyes and in the clear light of day; and concerning which there is not a scintilla of contradictory evidence, direct or circumstantial.

The argument contained in petitioner's brief (p. 25) that this Honorable Court, "commencing with *Tiller* v. *Atlantic Coast Line Company*, 318 U. S. 54, in a succession of cases has reversed almost every court which has held that a defendant was entitled to a directed verdict"; and (at p. 26), that "In view of the decisions of this Honorable Court, it is in fact difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict" —becomes weird in the light of the array of cases cited in the appendix to the concurring opinion of Mr. Justice Douglas, in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 72, 93 L. ed. 497, 510. Thirteen cases are therein cited wherein directions of verdicts by the lower courts were sustained on certioraris granted or refused; and all of them involved decisions rendered since the *Tiller case, supra*. One of such cases in which certiorari was denied (321 U. S. 763, 88 L. ed 1060) was the Virginia case of *Beamer* v. *Virginian Ry. Co.*, 181 Va. 650, 26 S. E. (2d) 43.

It seems therefore that the courts also have their "historic functions" to perform in their sphere of action in this class of cases, as well as in other negligence cases.

The attack by counsel for the petitioner on the Court of Appeals for the Fourth Circuit, in general (Petitioner's brief, p. 26); and the case of *Fore* v. *Sou. Ry. Co.*, 178 F. 2d. 349, in particular (Id. p. 27), is not only unjustified, but

also comes with ill grace from him, especially in view of the fact that he was counsel for the plaintiff in the *Fore case*, and applied for no certiorari to the Court's judgment in that case. The Court, in the said case, relied upon the decisions of the U. S. Supreme Court to support its judgment in sustaining the direction of the verdict for the defendant by the trial court.

The Court said (178 F. 2d, at p. 351):

> "The Supreme Court has made it crystal clear that under the Act the employer is not an insurer and that the injured employee can recover only upon proof of negligence on the part of the employer which is the proximate cause of the injury to the employee. Said Mr. Justice Black, in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 61:
>
> 'Much of respondents' argument here is devoted to to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability *only for negligent injuries*.' (Italics ours.)
>
> "See, also, *Myers* v. *Reading Co.*, 331 U. S. 477. In *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U. S. 29, 32-33, Mr. Justice Murphy stated:
>
> 'Petitioner was required to present *probative facts from which the negligence and the causal relation could reasonably be inferred. The essential requirement is* that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' *Galloway* v. *United States*, 319 U. S. 372, 395; *Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351. (Italics ours.)"

IX

CONCLUSION

In conclusion, we respectfully submit that for the reasons herein set forth, no writ of certiorari should be granted the petitioner in this case, and, accordingly, the petition should be denied.

Respectfully submitted,

WALTER LEAKE,
MEADE T. SPICER, JR.,
1103 Mutual Building,
Richmond, Virginia.

STROTHER HYNES,
1500 First National Bank Bldg.,
Richmond, Virginia.
Counsel for The Chesapeake and Ohio Railway Company.